

Introduction to Federal Indian Law & Trust Responsibility



**OR: HOW TO WEAR YOUR
FEDERAL TRUST GOGGLES**



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Tribes as Sovereigns



- Supreme Court first recognized in the Marshall Trilogy of cases- famous formulation in *Cherokee Nation v. Georgia*, 30 U.S. (5 pet.) 1 (1831) of Tribes as “domestic dependent nations.”
- Tribal powers are inherent and not derived from the federal government- these inherent powers derive from tribes’ status as distinct independent political communities.
- 1924 Indian Citizenship Act made all Native Americans born in the United States citizens.
- Since 1970s, most efforts by Congress and Executive Branch to improve conditions for Tribes have emphasized self-determination.
- Executive orders issued since President Clinton have instructed each agency of the federal government to operate “within a government-to-government relationship with federally recognized tribal governments.” 59 Fed. Reg. 22951 (1994).
- There are currently 566 Federally recognized Tribes.

The Government-to-Government Relationship



Executive Order 13175 of November 6, 2000:

- "The United States has a unique legal and political relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and judicial decisions."
- "The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights."
- "The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination."

Executive Order 13175



- The stated purpose of **Executive Order 13175** is "to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes."
- Tribes often point to consultation requirements in raising concerns about federal activities. Section 3 is a good touchstone:

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

- (a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.
- (b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.
- (c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:
 - (1) encourage Indian tribes to develop their own policies to achieve program objectives;
 - (2) where possible, defer to Indian tribes to establish standards; and
 - (3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Agency-Specific Tribal Consultation Policies

THE WHITE HOUSE

Office of the Press Secretary

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5, 2009

November

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Tribal Consultation

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175. Accordingly, *I hereby direct each agency head* to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of this memorandum, *a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175*. This plan shall be developed after consultation by the agency with Indian tribes and tribal officials as defined in Executive Order 13175. I also direct each agency head to submit to the Director of the OMB, within 270 days after the date of this memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

- DOI:

<http://www.doi.gov/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf>

- NOAA:

<http://www.legendary.noaa.gov/policybriefs/NOAA%20Tribal%20consultation%20handbook%20111213.pdf>

- EPA:

<http://www.epa.gov/tribalportal/pdf/cons-and-coord-with-indian-tribes-policy.pdf>

- FERC:

<http://www.ferc.gov/whats-new/comm-meet/072303/M-2.pdf>



Federal Trust Responsibility

Federal trust responsibility applies to all Federal agencies.

Legal sources of trust responsibility include the U.S. Constitution, federal common law, treaties, federal court decisions, and federal statutes.

There is a legally enforceable trust obligation owed by the United States Government to American Indian tribes ... [that] originated in the course of dealings between the government and the Indians and is reflected in the treaties, agreements, and statutes pertaining to Indians.

...

The fulfillment of this nation's trust responsibility to American Indians is one of the major missions of this Department.

Solicitor Leo M. Krulitz

In a letter to Asst Attorney General James Moorman, Nov. 21, 1978

The Contours of Trust Responsibility

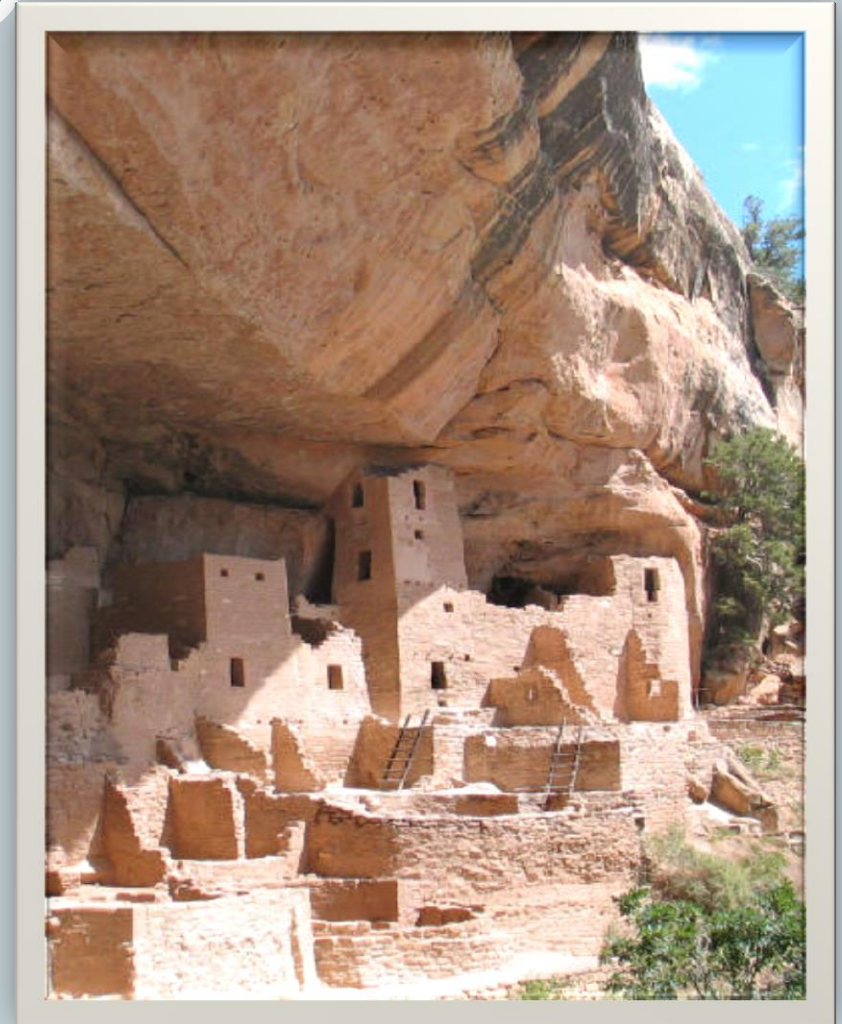


- The United States has a trust relationship with Indian tribes and individual Indians.
- As trustee, the United States is charged with “moral obligations of the highest responsibility and trust” and is judged by the “most exacting fiduciary standards.” *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).
- Statutes and regulations define the contours of the United States’ fiduciary responsibilities. *United States v. Mitchell*, 464 U.S. 206, 224 (1983).
- Nearly every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.



Trust Assets

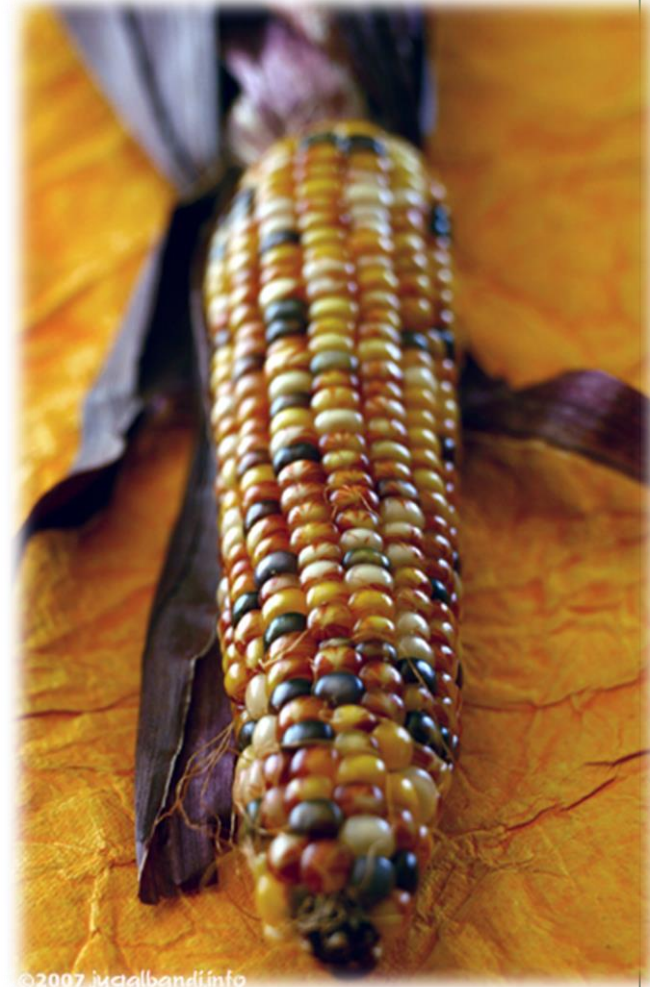
- Trustee – United States
- Beneficiary – Indian Tribe or individual
- Trust Corpus: Indian lands (individually or tribally owned)
 - Includes timber, minerals, fishing and hunting rights, water rights, grazing rights
 - Any income derived from trust assets



Indian Land



- “Any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status.” 25 C.F.R. 162.003
- The Bureau of Indian Affairs (BIA) is responsible for the administration and management of 55 million surface acres and 57 million acres of subsurface minerals held in trust by the United States for Indian tribes and individual Indians.
- BIA does not lease, or enforce leases of, tribal or individually owned fee land.



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Map can be found at
http://www.census.gov/geo/www/maps/aian2010_wall_map/aian_wall_map.html

Land Acts



- Indian Trade and Intercourse Act, 25 U.S.C. § 177
- General Right of Way Act of 1948, 25 U.S.C. §§ 323-328, 25 C.F.R. Part 169
- Indian Long Term Leasing Act, 25 U.S.C. § 415 (1955), 25 C.F.R. Part 162, as amended by HEARTH Act, Public Law 112-151, 126 Stat. 1150 (July 30, 2012)
- Indian Land Consolidation Act (ILCA), 2000 Amendments, 25 U.S.C. §§ 2201-2221
- Section 81 Agreements (1871), 25 U.S.C. 81, 25 C.F.R. Part 84.
2000 amendments substantially expanded tribal authority to enter into agreements that do not encumber tribal lands for 7 or more years

BIA Authorities under Federal Power Act

- ❖ BIA role varies depending on the FPA authority triggered, level of tribal involvement, and degree to which trust assets are affected. In general, BIA works in cooperation with tribes but does not necessarily represent a specific tribe. BIA has an independent interest.

Specifically:

- ❖ Under section 4(e): BIA develops specific measures to protect and enhance trust assets.
- ❖ Under section 10(a): BIA provides comments and recommendations to FERC.
- ❖ Under section 10(e): BIA supports Tribe as requested in negotiations; represents allottee concerns; independently analyzes and provides recommendations on 10(e) agreements.
- ❖ Under section 10(j): BIA works with USFWS to develop comments regarding fish and wildlife trust assets.
- ❖ Under section 18: BIA works with USFWS to develop fishway prescriptions protective of Indian resources.

Outside BIA: an All-Government Approach



❖ FWS:

<http://www.fws.gov/nativeamerican/>

❖ FERC:

<http://www.ferc.gov/industries/hydropower/indus-act/order-2002/tribal-policy.pdf>

❖ EPA:

<http://www.epa.gov/tribalportal/index.htm>

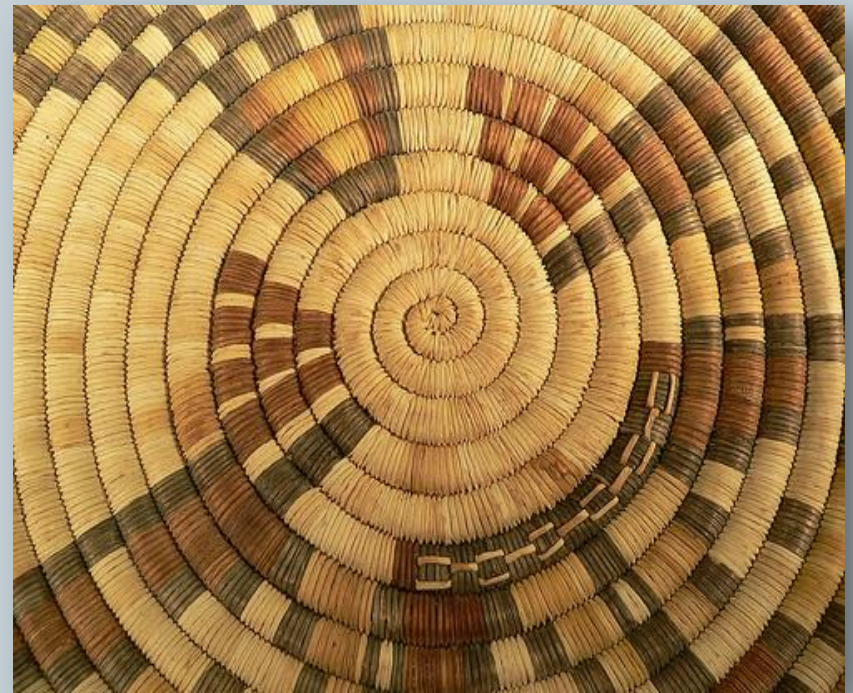
❖ NOAA:

<http://www.legislative.noaa.gov/tribalrelations.html>

Protecting Tribal Information



- Freedom of Information Act (FOIA): 5 U.S.C. 552 (a) & (b)
- *Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001):
- Tribes and agencies should be cautious and aware that shared information may be subject to FOIA.
- Identify all documents, sections of documents & types of information that are confidential, proprietary, and not intended for release.





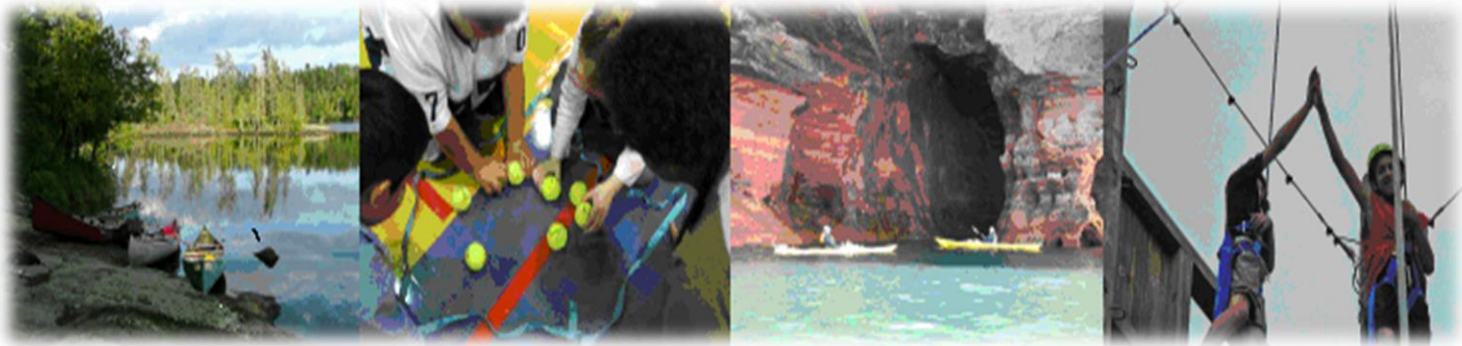
Federal Budget Process

BIA's budget is almost entirely discretionary, subject to annual appropriations.

- “This fiscal year 2016 budget reflects President Obama’s deep personal commitment to improving the lives of Indian people over the long term, focusing especially on Native youth, who represent the future of Indian Country,” said Assistant Secretary – Indian Affairs Kevin K. Washburn. “This budget will improve the federal government's capacity to meet the trust responsibility and support tribal self-governance.”
- The 2016 budget for Indian Affairs supports an “all of government” approach to addressing federal responsibilities and tribal needs. Coordination of this work across the federal government is being carried out through the White House Council on Native American Affairs, established by Executive Order on June 26, 2013, by President Obama and chaired by the Department of the Interior.

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QUESTIONS ?



Thank you!